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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

ERNEST NUNEZ, Plaintiff and Respondent, v. PHILIP GILBOY, Defendant and Appellant.	B221059 (Los Angeles County Super. Ct. No. BC400991)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael L. Stern, Judge. Affirmed.

David Fu and Associates and David D. Fu for Defendant and Appellant.

Law Offices of James J. Orland and James J. Orland for Plaintiff and Respondent.

Philip Gilboy, a licensed real estate broker, appeals from the judgment entered in favor of Ernest Nunez following a bench trial in Nunez's action against Gilboy for negligently preparing the note evidencing Nunez's $100,000 loan to David Gutierrez and causing the deed of trust securing the note to be recorded in the wrong county. Gilboy contends the trial court erred in refusing to offset the $100,000 damage award by the amount of usurious interest paid to Nunez by Gutierrez and by Gilboy himself on two unrelated loans. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Loan and Deed of Trust*

Nunez, a licensed clinical social worker, and Gilboy, doing business as The Real Estate Consultants, met and began doing business together in the mid-1990's when Gilboy acted as the listing broker for the sale of Nunez's home. Over the years Gilboy represented Nunez in the purchase and sale of several properties. In addition, Gilboy assisted Nunez with investments in real estate, recommending people to whom Nunez could make loans secured by deeds of trust. Nunez also made two substantial personal loans to Gilboy, one for $50,000 in March 2004 and the second for $100,000 in November 2005.

In April 2004 Gilboy recommended a $100,000 second-deed-of-trust investment in residential property owned by Gutierrez in San Clemente. Nunez agreed, obtained a cashier's check from his bank in Gilboy's name and delivered it to Gilboy. As with all prior similar investments suggested by Gilboy, Nunez had no contact with Gutierrez; Gilboy acted as the intermediary. On April 27, 2004 Gilboy met with Gutierrez, who executed an 18-month, interest-only installment note secured by deed of trust for $100,000 with an annual interest rate of 12 percent and a preprinted short form deed of trust and assignment of rents. The deed of trust identified the trustor as "David Gutierrez, III, A Married Man as his Sole and Separate Property" and stated the property subject to the deed of trust was located "in the City of Los Angeles, County of Los Angeles, State of California," with the address "29 Calle De La Luna, San Clemente, CA 92673."

Gilboy signed the deed of trust and affixed his notary stamp to it. The deed of trust was recorded in the Los Angeles County Recorder's Office on May 4, 2004. It was not recorded in Orange County where the property is located.

Notwithstanding the 18-month term of the loan, Nunez received monthly interest payments of $1,000 from Gutierrez from June 2004 through March 2008. (Some of Gutierrez's personal checks were returned for insufficient funds; Nunez demanded cashier's checks beginning in May 2007.) No principal payments were ever made, and Gutierrez ultimately defaulted on the note. In March 2008 Nunez learned Gutierrez had sold the San Clemente property. Subsequent investigation revealed Gutierrez and his wife, Hope N. Gutierrez, had sold the property (as "Husband and Wife as Joint Tenants") in September 2005 to Danielle Hetland.

2. *Nunez's Lawsuit*

On October 30, 2008 Nunez filed an unverified complaint for breach of contract, negligence and declaratory relief against Gutierrez, Gilboy and Matthew Hetland and Danielle Hetland, as co-trustees of the Hetland Family Trust, who Nunez alleged were the current owners of the San Clemente property previously owned by Gutierrez. Copies of the note and deed of trust signed by Gutierrez and a handwritten ledger sheet reflecting his interest payments were attached to the complaint.

Gilboy was named as a defendant only in the third cause of action for negligence. Nunez alleged Gilboy had breached a duty of care owed to him by failing to properly prepare the note evidencing his $100,000 loan to Gutierrez and causing the deed of trust securing the note to be recorded in Los Angeles County rather than Orange County. Nunez sought compensatory damages of $100,000, the sum lost when Gutierrez sold the property to the Hetlands without repaying the loan.

Gilboy answered the complaint and asserted 11 affirmative defenses. Gilboy did not allege the interest rate for the loan from Nunez to Gutierrez was usurious, nor did he claim any right to offset damages by the amount of usurious interest he had previously

paid to Nunez. Gilboy also filed a cross-complaint against Gutierrez and his wife for equitable indemnity, equitable contribution, fraudulent conveyance and constructive trust.

By the time of trial the Gutierrezes had filed for bankruptcy, and the action against them was stayed. The Hetlands, named only in Nunez's cause of action for declaratory relief, were dismissed from the case. Nunez and Gutierrez waived their right to a jury; and the court, after reviewing trial briefs submitted by both sides, heard the negligence claim in a half-day bench trial on October 5, 2009.

3. *Evidence at Trial*

Nunez and Gilboy each testified at trial and provided the information described above relating to their ongoing business relationship and the details of the Gutierrez transaction. Gilboy also testified he did not recall how or by whom the deed of trust was recorded. As the trial court observed in its statement of decision, no evidence was introduced concerning any due diligence by Gilboy regarding Gutierrez or the San Clemente property, including whether Gutierrez, who Gilboy knew was married, actually held title to the property as his separate property as recited in the deed of trust. In addition, there was no evidence Gilboy received any direct payment or commission for the services he performed in connection with the Gutierrez investment.

Testimony at trial established Gutierrez made total interest payments of $40,075 on the $100,000 note with the first payment ($1,000) received on June 2, 2004 and the last ($1550) on March 21, 2008. Gilboy paid total interest of $44,000—also at 12 percent—on the two loans made to him personally by Nunez.

4. *The Statement of Decision*

The trial court issued a statement of decision on October 15, 2009. After reviewing the procedural and factual background of Nunez's claim, the court concluded Nunez had proved each element of his cause of action for negligence against Gilboy. First, Gilboy owed a duty of care to Nunez and, in addition, had a fiduciary duty to protect his financial interests. Second, Gilboy was negligent in the performance of the acts he assumed to perform for Nunez. Third, Gilboy's failure to file the deed of trust in

the right county, which would ensure Nunez's loan would be recognized in the chain of title, was the proximate cause of Nunez's loss (Gutierrez's failure to repay the principal amount of the loan).

Although not asserted in Gilboy's answer to the complaint, the court considered and rejected Gilboy's defenses based on usury as "a red herring and inapplicable in this situation." The court ruled under Civil Code section 1916.1 there was no restriction on the rate of interest that could be charged because the loan had been arranged by a person licensed as a real estate broker (Gilboy). In addition, the court found Gilboy had no standing to challenge the interest rate because he was not a borrower in the Nunez-Gutierrez loan transaction. Finally, the court stated any issue of usury with respect to the personal loans made by Nunez to Gilboy himself did not negate Gilboy's duties to Nunez to ensure the Gutierrez loan was properly documented.

5. *Gilboy's Objections to the Statement of Decision and Motion To Amend Pleadings According to Proof*

Following receipt of the court's statement of decision, Gilboy filed objections questioning its analysis of his usury defense and its failure to consider the issue of comparative negligence. He also moved to amend his answer to conform to proof to allege the affirmative defense of offset with respect to the $44,000 in allegedly usurious interest he had paid to Nunez on Nunez's two personal loans to him.

After considering Gilboy's objections to the statement of decision, on November 10, 2009 the court entered a judgment, and on December 9, 2009 an amended judgment, in favor of Nunez and against Gilboy in the amount of $100,000, plus interest at the legal rate of 10 percent from March 31, 2008.[1] The motion for leave to amend according to proof was denied after a further hearing on December 21, 2009.

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[1] The November 10, 2009 and December 9, 2009 judgments were captioned "partial judgment" and "amended partial judgment," respectively, apparently because the case as to the Gutierrezes had been stayed and the action was not fully resolved.

CONTENTIONS

Gilboy's appeal challenges only the amount of damages awarded to Nunez, not the trial court's liability findings. Specifically, Gilboy contends the court erred in concluding the interest rate for the Nunez-Gutierrez loan was not usurious and refusing to reduce the principal amount otherwise due on the note by the unlawful interest payments made by Gutierrez. Gilboy also contends the court abused its discretion in denying his motion for leave to amend to assert the affirmative defense of offset and its failure to recognize a credit against the damages awarded for usurious interest payments made by Gilboy to Nunez.

DISCUSSION

1. *The Trial Court Did Not Err in Finding the Nunez-Gilboy Transaction Came Within the Licensed Broker Exemption from Usury Restrictions*

Article XV, section 1, of the California Constitution sets forth California's prohibition of usury. It limits the interest rate lenders can charge for personal loans to 10 percent per annum and for commercial loans to the higher of 10 percent or 5 percent plus the Federal Reserve Bank of San Francisco's rate on the 25th day of the month preceding the date the agreement was contracted. However, these limitations do not apply to, among others, "any loans, made or arranged by any person licensed as a real estate broker by the State of California and secured in whole or in part by liens on real property . . . ." (Cal. Const., art. XV, § 1, 5th par.; see *Stoneridge Parkway Partners, LLC v. MW Housing III, L.P.* (2007) 153 Cal.App.4th 1373, 1379.)

Civil Code section 1916.1 (section 1916.1) implements this constitutional exemption from the usury laws for licensed real estate brokers, providing, "The restrictions upon rates of interest contained in Section 1 of Article XV of the California Constitution shall not apply to any loan or forbearance made or arranged by any person licensed as a real estate broker by the State of California, and secured directly or collaterally, in whole or in part by liens on real property." In addition, section 1916.1 defines the term "arranged" as used in this context: "For purposes of this section, a loan or forbearance is arranged by a person licensed as a real estate broker when the broker

(1) acts for compensation or in expectation of compensation for soliciting, negotiating, or arranging the loan for another . . . . The term 'made or arranged' includes any loan made by a person licensed as a real estate broker as a principal or as an agent for others, and whether or not the person is acting within the course and scope of such license." (See *Green v. Future Two* (1986) 179 Cal.App.3d 738, 742-743 [Legislature sought to clarify the constitutional provision regarding usury by enacting § 1916.1, which limits the real estate broker exemption to situations in which the broker acts for another and receives or expects to receive compensation]; *Park Terrace Limited v. Teasdale* (2002) 100 Cal.App.4th 802, 806 ["[a] licensed real estate broker arranges a loan if he or she acts for another and receives or expects to receive compensation for it"].)

Gilboy contends the trial court erred in concluding the section 1916.1 exemption applied to the Nunez-Gutierrez loan transaction, notwithstanding his status as a licensed real estate broker and his role in facilitating Nunez's investment, which was secured by a deed of trust on the San Clemente property, because the court did not find he had received any payment for his services as an intermediary in connection with the loan. As Gilboy notes, the court's statement of decision expressly states, "There is no evidence that Gilboy received any payment or commission for performing these services for Nunez." Yet the court also found, immediately after the statement upon which Gilboy relies, "However, he [Nunez] had lent Gilboy substantial sums of money during this time period."

The juxtaposition of these two sentences in the statement of decision leaves no doubt the court, in fact, found Nunez's willingness to lend money to Gilboy, albeit at an interest rate Gilboy now asserts was also usurious, constituted a form of compensation sufficient to trigger the licensed broker exemption of section 1916.1.[2] Viewing the entire

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[2] The trial court cited section 1916.1 in the statement of decision in support of its conclusion, "There is no interest rate cap in this situation." In his objections to the statement of decision, Gilboy again asserted, as he had at trial, that he had received no payment for facilitating the Nunez-Gutierrez loan; but he did not challenge the application of section 1916.1 to the loan on that basis or suggest his receipt of personal

record in the light most favorable to Nunez, the prevailing party, and resolving all inferences in support of the judgment, as we must (see *Milton v. Perceptual Development Corp.* (1997) 53 Cal.App.4th 861, 867), there is unquestionably substantial evidence to support this factual determination. (See *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 334 ["'questions as to the weight and sufficiency of the evidence, the construction to be put upon it, the inferences to be drawn therefrom, the credibility of witnesses . . . and the determination of [any] conflicts and inconsistencies in their testimony are matters for the trial court to resolve'"].)[3]

2. *Denial of Gilboy's Posttrial Motion for Leave To Amend According To Proof Was Not an Abuse of the Trial Court's Discretion*

The constitutional and statutory exemptions from the usury laws for licensed real estate brokers apply to loans made by the broker or arranged by the broker for another party, not loans made directly to the broker himself or herself. (See *Gibbo v. Berger* (2004) 123 Cal.App.4th 396, 403; *Winnett v. Roberts* (1986) 179 Cal.App.3d 909, 919.)

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loans from Nunez or participation in a series of financial transactions with him did not constitute "compensation" within the meaning of that section. (Cf. *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133 [if a party fails to bring omissions or ambiguities in the statement of decision to the trial court's attention, then "that party waives the right to claim on appeal that the statement was deficient in these regards"].) Gilboy did argue the licensed broker exemption did not apply to Nunez's loans to him personally—a different issue that we address in the following section of this opinion.

[3] Because the interest payments were contractually authorized and excepted from the usury laws, they did not diminish the principal owed by Gutierrez to Nunez. (Cf. *Winnett v. Roberts* (1986) 179 Cal.App.3d 909, 921 ["When a loan is usurious, the creditor is entitled to repayment of the principal sum only. He is entitled to no interest whatsoever."]; *Garver v. Brace* (1996) 47 Cal.App.4th 995, 1000 ["payments on a usurious note are deemed to apply first to principal"]; *Shirley v. Britt* (1957) 152 Cal.App.2d 666, 670 [usurious interest paid by the borrower should be applied as an offset to reduce the borrower's principal obligation to the lender].) Accordingly, we need not address whether Gilboy, who was neither the borrower nor a guarantor of the note, would have been entitled to an offset or other form of reduction in the damage award if the interest payments had been usurious. (See *Roes v. Wong* (1999) 69 Cal.App.4th 375, 379 ["the usury law had not been applied for the benefit of persons other than the borrower or its representatives"].)

Thus, to the extent Nunez lent money to Gilboy at a usurious rate and Gilboy not only made interest payments but also repaid the full principal amount of the loans, he had a claim for unjust enrichment against Nunez. (*Gibbo*, at p. 404.) Even if the limitations period had otherwise expired on such a claim, any improper interest payments Nunez received from Gilboy on those personal loans, if properly pleaded and proved at trial, could serve as an offset to damages awarded to Nunez on his negligence claim against Gilboy. (Code Civ. Proc., § 431.70.)

Evidence was presented at trial concerning Nunez's personal loans to Gilboy. Indeed, as discussed in the preceding section, it was those loans, made in the context of an ongoing, mutually beneficial business relationship between Nunez and Gilboy, that provided the basis for the trial court's implied finding Gilboy was compensated for arranging the additional loan to Gutierrez to refinance the San Clemente property. However, the claim those loans were usurious was never pleaded as an affirmative defense (offset) or by way of cross-complaint; and Gilboy did not seek leave to amend his answer during trial when the issue was raised by his counsel. In its statement of decision the court briefly discussed Gilboy's defense based on the Nunez-Gilboy loans, stating, although the loans shed light on the financial relationship between the two men, "they do not negate Gilboy's duties to Nunez to ensure that the Gutierrez loan was properly arranged and Nunez's monies protected to the extent possible through proper recording." The question of usury was not addressed.

Only after receiving the adverse statement of decision did Gilboy finally move to amend his answer to assert the affirmative defense of offset with respect to $44,000 in allegedly usurious interest he had paid to Nunez. Gilboy argued the issue had been fully litigated, thus Nunez would not be prejudiced by allowing the amendment. The hearing on the motion was held after the court had reviewed and denied Gilboy's objections to the statement of decision and entered its judgment in favor of Nunez. The court denied the motion, finding it untimely: "We had a trial. It's kind of late to go back and amend your answer. . . . There isn't any procedure in the books for amending an answer after

judgment has been entered . . . ." Gilboy now contends that the posttrial ruling constituted an abuse of discretion. (See *Singh v. Southland Stone, U.S.A., Inc.* (2010) 186 Cal.App.4th 338, 355 ["decision whether to grant leave to amend a pleading at trial is committed to the sound discretion of the trial court"].)

"A trial court may allow the amendment of a pleading at any time up to and including trial. [Citations.] Leave to amend to conform to proof at trial ordinarily is liberally granted unless the opposing party would be prejudiced by the amendment. [Citation.] Leave to amend a pleading at trial is properly denied, however, if the proposed amendment raises new issues that the opposing party has had no opportunity to defend." (*Singh v. Southland Stone, U.S.A., Inc., supra,* 186 Cal.App.4th at pp. 354-355.)

The court's denial of Gilboy's posttrial motion was well within its ample discretion in this matter. The evidence at trial was that Gilboy paid Nunez a total of $20,000 in interest during a four-year period (from April 2004 to April 2008) on a loan of $50,000—an actual, simple interest rate of 10 percent, although the parties' agreement apparently specified a 12 percent interest rate.[4] He also paid a total of $24,000 in interest on a loan of $100,000, which was outstanding for a period of approximately two years ten months (from November 2005 through September 2008)—an actual interest rate under 10 percent. As Gilboy notes, Nunez did not object to the introduction of this evidence. However, there was no concession the loans were in fact usurious; and, although Gilboy asserted in conclusory fashion that they were, the issue was not presented to the trial court prior to the belated motion for leave to amend. Indeed, in closing argument Nunez insisted there was no need to consider Gilboy's entitlement to an offset because no claim to offset had been pleaded. The proposed amendment was thus both late and raised new issues that the opposing party had no opportunity to defend.

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[4] Neither the promissory note memorializing Nunez's $50,000 loan to Gilboy nor the note for the subsequent $100,000 loan was introduced into evidence. Information concerning Gilboy's interest and principal payments on both loans was based on Nunez's handwritten ledgers.

DISPOSITION

The judgment is affirmed. Nunez is to recover his costs on appeal.

PERLUSS, P. J.

We concur:

WOODS, J.

JACKSON, J.